Office-Supreme Court, U.S.
FILED
DEC 29

NO. 255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE AMERICAN SHIP BUILDING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari To The United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR LOCAL 374, BOILERMAKERS, AMICUS CURIAE

BERNARD M. MAMET,
Suite 1326,
327 South La Salle Street
Chicago, Illinois 60604
Attorney for Said Amicus Curiae

CHAMPLIN-SHEALY COMPANY, CHICAGO 365

INDEX

	PAGE
STATEMENT	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
CONCLUSION	14

CITATIONS

Cases:

Continental Baking Co., 100 NLRB 143	12
Davis Furniture Co., 100 NLRB 1016	12
Morand Bros. Beverage Co., 99 NLRB 1448	12
NLRB v. John Brown, et al., 319 F. 2d 7 (1963), cert. granted, 375 U. S. 962 (1964)	11
NLRB v. Crompton-Highland Mills Inc., 337 U. S. 217 (1949)	13
NLRB v. Drivers Local 639, 362 U. S. 274 (1960)	7
NLRB v. Erie Resistor Corp., 373 U. S. 221	11
NLRB v. Insurance Agents' International Union, 361 U. S. 77 (1959)	7
NLRB v. Mackay Radio & Telegraph Co., 304 U. S. 333 (1938)	7, 11
NLRB v. Truck Drivers Local Union 449, 353 U. S. 87 (1957)	4, 9, 11

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, et seq.):	
Section 7	2, 4, 6, 8, 10, 14
Section 8(a)(1)	2, 3, 4, 6, 7, 8, 10, 11, 12, 14

Section 8(a)(3) 2, 3, 4, 6, 7, 8, 10, 11, 12, 14
Section 8(a)(5) 2, 5, 6, 8
Section 8(d) 2, 3, 5, 6, 7, 8
Section 8(b)(1)(A) 7
Section 8(b)(3) 5, 6, 7

Miscellaneous:

87 Monthly Labor Review 1370, U. S. Dept. of Labor, Nov., 1964 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE AMERICAN SHIP BUILDING COMPANY,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari To The United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR LOCAL 374, BOILERMAKERS, AMICUS CURIAE

STATEMENT

This Brief is submitted in behalf of Local 374, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, with the written consent of both parties herein, copies of which consents have been heretofore transmitted to the Clerk of the Court. Local 374 requests that the Court affirm the Court of Appeals' enforcement of the Board's order. The said Local Union was the charging party before the National Labor Relations Board and a party before the Court of Appeals wherein in a petition for review, consolidated with the Board's petition for enforcement, it sought to enlarge the scope of the Board's order—an issue not involved herein.

SUMMARY OF ARGUMENT

Petitioner here was found guilty of violating Section 8 (a) (1) and (3) of the Act because it discriminated against its employees in regard to the tenure of their employment and because it otherwise interfered with rights guaranteed the employees in Section 7 of the Act. True, the employer laid off (locked out) its employees in order to wrest bargaining concessions from the employees' union, but the action taken by the employer was not against the union. It was against the employees. Moreover, the employer was not found guilty of violating its obligation toward the union in refusing to bargain in good faith. The Board found no Section 8 (a) (5) violation. Yet, the question Petitioner seeks to have reviewed is whether the provisions of Section 8 (d) of the Act equate the employees' right to strike with an employer's right to lay off or lock out. In the Argument we demonstrate that Section 8 (d) merely sets forth and is confined to enumerating standards of conduct between employers and unions for the purpose of determining minimal compliance with Section 8 (5) of the Act. We note that Section 8 (d) and Section 8 (5) are separate and distinct from Section 8 (a) (1) and 8 (a) (3) and that even assuming, *in arguendo*, the use of the word "lockout" in Section 8 (d) immunizes an employer from a claimed violation of Section 8 (a) (5) of the Act, an employer may still be guilty of an 8 (a) (1) and 8 (a) (3) violation when it locks out its employees. In the Argument we discuss the nature of the varying rights and the relationships under the Act—the employer-union relationship and the employer-employee relationship and we point out that each is different: While employees are represented by unions, employees are not unions and the impact of permitting a lockout during collective bargaining results actually in penal-

izing an employee because he has joined a union. We suggest that the positive protections granted an employee *vis-a-vis* his employer are substantially different from those granted the employer and the union *vis-a-vis* each other. And, to the extent that Section 8 (d) treats only the employer-union relationship, it is clearly inapplicable to violations revolving around discrimination and interference with employees' rights. Moreover, it would appear anomalous to us to find that employees' rights against discriminatory layoffs before they become represented by a union are fully protected but when that representation is translated into an actuality *via* the collective bargaining process itself, the employees' protection against a discriminatory layoff is either vitiated or substantially reduced.

In our first line of inquiry we attempt to demonstrate that Section 8 (d) does not prohibit the Board from protecting employees' rights and finding the employer guilty of 8 (a) (1) or (3) violations. As regards the balance struck here by the Board we suggest that there has been no inconsistency or abuse of discretion. In fact, if consistency is necessary, the Board has treated the multi-employer situation the same as the single employer situation. In each instance there must be an affirmative act by either the employee himself or by the bargaining representative of the employee imputable to the employee. Obviously, in the multi-employer situation, a strike has occurred in a portion of the bargaining unit and under the Board's view the employer is immunized against any claim of illegality in locking out the employees in the balance of the bargaining unit. In the single employer situation, the Board requires a finding of the threat of a strike before it will determine whether the employer's action is "offensive" or "defensive". Using an "offensive" or "defensive" test, the Board, through ascertaining objective facts, translates these words into an operational definition which can be reasonably measured. First and fore-

most, in each situation, there must either be strike imminency or a strike itself—and consistently (at least since 1954) the Board has applied these yardsticks.

While the balance struck by the Board is not arbitrary, we would go beqond the Board's view. We believe the position taken by the Board prior to 1954 is more compatible with the terms of the Act. Our view of the discriminatory layoff or lockout situation is that the employee is specifically protected against such action under Section 8 (a) (3) of the Act and that the employer has no corresponding or counter right under any provision of the Act: there is nothing to balance. While in certain situations the employees' rights may not be absolute, we nevertheless suggest that before a balance can be struck, one must find at least some employer right in the existing Act and we find none. Admittedly, under this Court's decision in *NLRB* v. *Truck Drivers Local* 449, 353 U. S. 87 (1957) our contention is not in accord with existing law. From the standpoint of the practitioner, one can only hope that the Board can be convinced in the future to revert to its pre 1954 views. Irrespective of what reappraisal may be made by the Board, we suggest that the Board, within the area of policy allowed to it, has not abused its discretion. We note the seriousness of lockouts and the potential effects upon employees and the collective bargaining process in general. We point out that in the final analysis the employer still has the right to unilaterally change working conditions and place its last offer into effect once an impasse has been reached and that as long as the Board continues to arrive at a balance by examining whether or not a strike has occurred in multi-employer units or the threat of a strike in single employer units, the employer cannot legitimately complain: it has been granted greater rights in terms of infringing upon employees' rights than we believe was contemplated under Sections 7, 8 (a) (1) and (3) of the Act.

ARGUMENT

The question presented for review is whether, under Section 8 (d) (4), the 1947 Amendment to the National Labor Relations Act, an employer lockout is a corollary of the employees' right to strike. Significantly, Section 8(d) (of which sub-paragraph 4 is a part) treats only one subject—it statutorily sets forth some of the requirements of good faith bargaining as regards the employer [Section 8 (a) (5)] and the union [Section 8 (b) (3)]. Where there is a collective bargaining agreement in effect, Section 8 (d) provides that the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify it unless the party desiring modification or termination serves a written notice, offers to meet and confer, notifies the Federal Mediation and Conciliation Service and, under sub-paragraph 4, "continues in full force and effect, without resorting to strike or *lockout*, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration of such contract, whichever occurs later" (Italics supplied). Thus, the minimal requirements for compliance with the good faith bargaining provisions of the Act (imposed under the 1947 amendment on unions as well as employers) are set forth in Section 8 (d). Respondent would argue that because Section 8 (d) expressly utilizes the word "lockout", the employer's right to lockout must necessarily be equated (or is a necessary corollary of) the employees' right to strike for all purposes.

By utilizing Section 8 (d) (4), Petitioner seeks to advance an equation of rights as between employers and employees. Yet, 8 (d) (4) deals not with the relationship between an

employer and his employees, but rather treats requirements of good faith bargaining between employers and unions, and while unions are representative of employees, unions are not employees. The Act deals not with two parties alone (the employer and the union) but it affords protection and imposes restrictions upon at least one additional party —the employee. And these three identifiable subjects are not geometrically molded into an isosceles triangle under the Act. Congress did not determine that the duties imposed upon one should necessarily, and for all purposes, be imposed upon another. True, the 1947 amendment to the Act, under Section 8 (b) (3), imposed a duty upon labor organizations to bargain in good faith and to come to the bargaining table with the same attitude of willingness to reach an agreement as the Wagner Act had required of employers. But this duty, defined further under Section 8 (d), was not designed to and did not take away any rights of employees existing elsewhere in the Act. Standards of conduct generating from a mutual duty of employers and unions to negotiate in good faith were never intended to limit the employees' rights under Section 7, Section 8 (a) (1) or Section 8 (a) (3) of the Act. Even if it could be argued that the use of the word "lockout" in Section 8 (d) might imply that the lockout alone would not violate the good faith bargaining provisions of the Act [Section 8 (a) (5)] does it follow that a lockout is *per se* legal for the purposes of Section 8 (a) (3) and 8 (a) (1)? Because the lockout might not be a factor to consider in evaluating the conformance with standards of conduct required in good faith bargaining, must it also be excluded in determining whether or not the employer has discriminated against employees in regard to hire or tenure of employment [Section 8 (a) (3)] or whether it has interfered with, restrained or coerced employees in the exercise of the rights guaranteed in Section 7

of the Act [Section 8 (a) (1)]? We suggest that the positive protections granted an employee *vis-a-vis* his employer are substantially different from those granted the employer and the union *vis-a-vis* each other. A union may not violate the provisions of Section 8 (b) (3) by engaging in harassing tactics during negotiations, but the participating employees may not be protected in their concerted activities under Section 7. *NLRB* v. *Insurance Agents' International Union*, 361 U. S. 77 (1959).[1] Under Section 8 (d) of the Act, a union which fails to comply with each of the enumerated steps is guilty of an 8 (b) (3) violation. Yet, the Act [Section 8 (d)] only imposes a duty on the employee not to strike within the sixty day notice period and provides that if he does he loses his status as an "employee" and then only under certain sections of the Act. While obviously, relationships exist between many sections of the Act, virtually each section is separate: the fact that certain activity does not violate one section of the Act does not mean that the same activity may not violate another section of the Act no more than the violation of one section results in automatic violations of other sections. *Cf., NLRB* v. *Drivers Local 639*, 362 U. S. 274 (1960).[2] True, balances are struck under the Act, but these balances are neither necessarily static not symmetrical. Whether concepts of tit

---

1. Significantly, *Insurance Agents* dealt only with the union's duty to bargain and whether or not the use of harassing tactics by a union during bargaining was a *per se* failure to bargain in good faith in violation of Section 8 (b)(3). There, the relationship between employer and union was directly brought into play but in no way did it involve Section 8 (1) and (3) rights of employees.

2. Noteworthy is the fact that although the conduct of the union there did not constitute an 8 (b)(1)(A) violation, it did constitute an 8 (b)(7) violation under the amended Act. See Memorandum of Justice Stewart, 362 U. S. at 292. So, too, conduct not violative of Section 8 (d)(4) may nevertheless violate Sections 8 (a)(3) and (1).

for tat or *quid pro quo* apply may be germane in a legislative forum, but as regards existing legislation, each right, duty, privilege or proscription must be viewed not only from the standpoint of the moving party and the recipient of the action but additionally from the section of the Act claimed to have been violated. A change in mixture may change the result. What one class may do, other classes may be prohibited from doing. What may be privileged as against one class may be proscribed as against another. And, what may not violate one section of the Act may be a violation of another.

In passing, it is to be noted that we have not concerned ourselves with whether the use of the word "lockout" in Section 8 (d) may or may not immunize an employer from a claimed 8 (a) (5) violation. We only say that it has no bearing upon Sections 8 (a) (1) and (3)—or even upon this case. Notably, no 8 (a) (5) violation was found here. The Board did not find the employer guilty of not bargaining in good faith but rather it found that by laying off its employees (here called lockout because it involved all of the non-supervisory employees at one location) it discriminated against these employees in regard to the hire or tenure of their employment in violation of Section 8 (a) (3) of the Act and derivatively it interfered with the Section 7 rights in violation of Section 8 (a) (1) of the Act. Whether or not the employer also violated an obligation imposed upon it as regards bargaining and whether or not the Act grants employers and unions identical and equal rights under Section 8 (d) is not involved here.

Petitioner's argument is not limited to a statutory exclusion theory (*i. e.*, the use of the word "lockout" in Section 8 (d) prohibits the Board from finding that a lockout violates any provision of the Act). Petitioner also argues

that the Board's position has been "inconsistent and vacillating" (Brief, pg. 9). The action of the Board has been arbitrary, it claims, because the Board's "position on individual employer lockouts is in stark contrast with its position on the legality of lockouts where multi-employer bargaining is involved." (Brief, pg. 11) It concludes that because of an alleged disparity of approach in the multi-employer and single employer situations, the Board should be reversed. At this stage of its argument, Petitioner apparently then does not question the right of the Board to balance conflicting interests. Rather it seems to contend that the Board has abused its discretion. To begin with, what Petitioner claims to be inconsistent and vacillating may be nothing more than the empiric process of balancing conflicting interests through the exercise of non-static judgment, based upon particular facts at a particular time. More important, if consistency is a *sina qua non* to the appropriate exercise of discretion (and we do not know that it is) the Board has indeed fulfilled that requirement as regards multi-employer and single employer lockouts. In both situations it requires a strike threat or the fulfillment of that threat—the strike itself. What Petitioner overlooks is that in *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U. S. 87 (1957) there was a strike in the multi-employer bargaining unit. The Board, with this Court's approval, held that where a strike occurs in one portion of a bargaining unit a "lockout to preserve the multi-employer bargaining basis from disintegration threatened by the union's strike action was lawful." *Id* at 97. Similarly, in the single employer situation the threat of an immediate strike represents the critical factor. In these types of situations the Board utilizes the words "offensive" and "defensive". Each case is decided on its own facts. In striking a balance the Board has not relied upon subjective contentions, but rather upon objective criteria measurable by the facts in the par-

ticular case and not by self-serving opinions of either side verbally expressed from a witness stand. Hence, some lockouts have been found not to violate the Act and others have been found to be illegal. If the lockout was "offensive" in nature, *i. e.*, designed to wrest bargaining concessions from the employees by utilizing the economic power of withholding work and pay to starve them into submission, then there was illegal interference and the Act was violated. On the other hand, if the action of the employer was truly "defensive" in nature and designed to protect the integrity of the employer's business, then the lockout might be justified. In each instance, words such as "offensive" or "defensive" have been translated operationally by the Board. First and foremost was the consideration of whether or not the actual threat of a strike existed. If it did, then perhaps the action of the employer was defensive in nature. If no strike threat existed, and if, in addition, there were assurances against a strike then the objective facts clearly demonstrated an aggressive offensive move on the part of the employer designed to illegally interfere with the rights of employees guaranteed in Section 7 and 8 of the Act.

Clearly, the balance struck by the Board is not arbitrary. Actually, our analysis of the varying rights under the statute would lead us to the conclusion that lockouts are *per se* violative of Sections 8 (a) (1) and (3) of the Act. We see no clash between the employee's right to be protected against discrimination in regard to hire or tenure of employment under Section 8 (a) (3) and any offsetting statutory right of an employer. We believe that a lockout is inherently discriminatory and destructive and that no business purpose, however legitimate, represents a defense to a lockout. It appears anomalous to us to find employees' rights against discriminatory layoffs fully protected when the employee

seeks to be represented by a union but when that representation becomes an actuality in the collective bargaining process itself, the employees' protection against the same discriminatory layoff is vitiated—or at least substantially reduced. We are, not unmindful of *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938)[3] and, of course, directly in point, *NLRB* v. *Truck Drivers Local Union 449*, 353 U. S. 87 (1957).[4] Significantly, in each of these cases, affirmative action was taken by the employee himself or at least could be imputed to the employee by the action his collective bargaining agent had taken. In the *Mackay* case the employee struck. In the *Truck Drivers, Local Union 449* case a strike occurred in a portion of the bargaining unit of which the employee was a part and while the employee discriminated against may not have participated in any decision to take any action, it perhaps could be said that he was bound by the decision of his bargaining agent. Even here, we would disagree that 8 (a) (1) and (3) rights of *employees* could be altered by becoming a member of a union or by the employee or a fellow bargaining unit member

3. It is to be noted that the Board, with this Court's approval, refused to extend the *Mackay* doctrine by granting super seniority to strike replacements, with this Court noting that "We have no intention of questioning the continuing vitality of the *Mackay* rule, but we are not prepared to extend it to the situation we have here." *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 232 (1963).

4. *NLRB* v. *John Brown, et al.*, No. 7, pending this term before this Court, presents complications which flow from the Board's striking a balance which would permit employers in a multi-employer bargaining unit to lock out their employees following a strike of one of the employers. Evaluating what it calls competing interests, the Board in *Brown* properly is unwilling to extend the multi-employer lockout concept to a point where locked out employees, ready and willing to work, may be temporarily replaced. Within its special function, the Board has struck a balance which it believes appropriate. Perhaps in future years, as various problems develop, it may desire to reexamine the balance it struck in the *Truck Drivers Local Union No. 449*.

striking or the employee's union threatening to strike. This, however, is the existing law and the practical quarrel stops there; except perhaps for practitioners to attempt to convince the Board to revert to its pre 1954 views. *Morand Bros. Beverage Co.*, 99 NLRB 1448, 1461-1466; *Davis Furniture Co.*, 100 NLRB 1016; *Continental Baking Co.*, 100 NLRB 143. But irrespective of what reappraisal is made in the future, to permit further encroachment upon rights guaranteed employees under Sections 8 (a) (1) and (3) of the Act, we submit, will have devastating consequences. Lockouts are feared for no small reason. In the final analysis, it is the employer who controls the pay check. It is one thing to join a union and even to participate in union activities. It is quite another to be deprived of earnings because of the joining of a union. One need only attend a union meeting at contract time to ascertain that there may well be a right more valuable than the right to strike—the right not to strike. In virtually all unions today, constitutions require that a strike be authorized by at least a majority of the members voting (and as regards the instant union, by two-thirds of the membership). And despite the notoriety given some strikes, it is significant that only thirteen one-hundredths of 1% of estimated working time was lost in the calendar year 1963 due to strikes.[5] Clearly, the employee has not been prone to vote himself on the street. Luxuries have merged into necessities with the resultant expansion of credit extension. The employee's requirements to meet periodic payments indeed militates against the resort by him to economic pressure, except in rare cases. Yet, one employer representative in authority is all that is necessary to decree a lockout. And we submit

5. *See*, 87 Monthly Labor Review 1370 (U. S. Dept. of Labor, Nov., 1964).

that under the Act, the employee has the right not to be exposed to the type of interference generated by a lockout—that he has the right to rely upon the collective bargaining processes without fear of or needless work stoppages.

In its Memorandum in answer to the Petition, the Board stated that the "use of the lockout as an 'offensive weapon' in collective bargaining has not proved a major practical problem in the administration of the Act." (Brief, pg. 11) We believe that if this is so, it has been because of the prevailing concept among those in labor and industry that a lockout may be illegal. We suggest that legalizing its use will set the stage for constant warfare as a substitute for exploration and bargaining table exchanges designed to arrive at a settlement sufficiently palatable to all concerned. True, employees, bowing to the employer's condition of "no contract—no work," may well accept lesser settlements in order to avoid financial deprivation, but pressure and power plays have a way of coming full cycle with the recipients of the pressure waiting for the appropriate time to retaliate. We suggest that the existing collective bargaining processes have proved beneficial to our society. The move toward mature labor relations in recent years has come not from workstoppages but rather from mutual understanding arrived at through the exchange of ideas *via* the bargaining process. In those situations where the employer believes that the bargaining process has been exhausted, he is still permitted to unilaterally change working conditions and to place his last offer into effect once an impasse has been reached. *NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 224-225 (1949). And certainly as long as the Board continues to arrive at its balance by examining whether or not a strike occurred in multi-employer units or the threat of a strike in single employer units, the

employer has been granted greater rights in terms of infringing upon employees' rights than we believe was contemplated when the protections for employees were established in Sections 7 and 8 (a) (1) and (3) of the Act.

CONCLUSION

For the foregoing reasons, we join the Board in requesting that the Court of Appeals decision enforcing the Board's order be sustained.

Respectfully submitted,

BERNARD M. MAMET,
Suite 1326,
327 S. La Salle Street,
Chicago, Illinois,
HArrison 7-7630,
Attorney for Local 374, Amicus Curiae.

Chicago, Illinois,
December 23, 1964.